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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PENSION BENEFIT GUARANTY CORPORATION,
Appellant,

v.

YAHN & MCDONNELL, INC., and
THE PENNSTAR COMPANY, *et al.*,
Appellees.

UNITED RETAIL AND WHOLESALE EMPLOYEES
TEAMSTERS UNION LOCAL NO. 115 PENSION PLAN, *et al.*,
Appellants,

v.

YAHN & MCDONNELL, INC., and
THE PENNSTAR COMPANY, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Third Circuit

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE APPELLEES

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BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE APPELLEES

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States ("Chamber") is the nation's largest federation of businesses, with a membership consisting of more than 180,000 corporations, partnerships and proprietorships, as well as several thousand trade associations and state and local chambers of commerce. An important aspect of the Chamber's activities is presenting its members' views on business issues before all branches of the federal government. In this capacity, the Chamber has participated as *amicus curiae* in a wide spectrum of legal challenges to laws which impose unconstitutional or onerous restrictions on businesses.[2]

The withdrawal liability provisions of the Multiemployer Pension Plan Amendments Act at issue in this case impose restrictions on businesses which are both unconstitutional and onerous. Under the Act, any employer that withdraws from a multiemployer pension plan must pay to the plan a proportional share of its unfunded vested benefits. This withdrawal liability is computed and collected by the plan trustees, a group of officials who are responsible for managing the plan. The Act also makes these trustees the statutory guardians of plan assets, and charges them with a strict fiduciary duty to act for the exclusive purpose of providing benefits to plan participants. Section 104(2) of the Act, the provision at issue before the Court, further provides that

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[1] This brief is being filed with the consent of the parties, pursuant to Supreme Court Rule 36.2. The consent letters have been filed with the Clerk of the Court.

[2] *See, e.g., California Federal Savings & Loan Ass'n* v. *Guerra*, 107 S. Ct. 683 (1987); *Fort Halifax Packing Co.* v. *Coyne*, 510 A.2d 1054 (Me. 1986), *prob. juris. noted*, 107 S. Ct. 430 (U.S. Nov. 10, 1986) (No. 86-341); *Wisconsin Dept. of Labor & Industry* v. *Gould*, 106 S. Ct. 1057 (1986); *TWA* v. *Thurston*, 469 U.S. 111 (1985); *PBGC* v. *R.A. Gray & Co.*, 467 U.S. 717 (1984); *Chamber of Commerce of the U.S.* v. *State of New Jersey*, 89 N.J. 131, 445 A.2d 353 (1982).

trustees' assessments of withdrawal liability are *presumed correct* in any subsequent arbitral challenge.[3]

This Court has recognized that the fifth amendment principle that no person shall be deprived of property without due process of law includes a guarantee that the presiding tribunal will be impartial. While pension plan trustees act as a tribunal for withdrawing employers, they hardly constitute an impartial tribunal. Trustees have an "innate taint of partiality"[4] against withdrawing employers resulting from their statutory combination of asset-guarding and penalty-assessing responsibilities. Beyond subjecting withdrawing employers to the assessment of this biased tribunal, the MPPAA imposes on the employer the burden of overcoming a statutory presumption that the assessment is correct. The Chamber submits that adding this layer of armor to an already weighted assessment deprives the employer of the due process mandated by the fifth amendment.

The Chamber was—and is—a supporter of the MPPAA's goals. It is in the interest of companies remaining in multiemployer plans and their employees that withdrawing companies pay their proportional share of the plan's unfunded vested benefits. However, the statutory presumption of correctness denies withdrawing employers any meaningful opportunity to obtain a fair calculation of this liability. *De novo* review by an impartial decision maker—the arbitrator—will guarantee withdrawing em-

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[3] Section 104(2), 29 U.S.C. §1401(a)(3)(A), provides that "any determination made by a plan sponsor under sections 1381 through 1399 of this title and section 1405 of this title is presumed correct unless the party contesting the determination shows by a preponderance of the evidence that the determination was unreasonable or clearly erroneous."

[4] *See Keith Fulton & Sons, Inc.* v. *New England Teamsters & Trucking Industry Pension Fund, Inc.*, 762 F.2d 1137, 1142 (1st Cir. 1985) (en banc), *quoting Dorn's Transportation, Inc.* v. *IAM Nat'l Pension Fund*, 578 F. Supp. 1222, 1237-38 (D.D.C. 1984), *aff'd mem.*, 753 F.2d 166 (D.C. Cir. 1985).

ployers such a fair calculation. Given the large sums of withdrawal liability often assessed, this safeguard will mean the difference between staying in business and bankruptcy for some withdrawing employers. It also may quell the fears of companies currently reluctant to join multiemployer plans because of the perceived danger of immense and unchallengeable withdrawal liability assessments.

Because the Chamber is uniquely situated to present to the Court the broad business perspective on this important issue, it submits this brief, and urges the Court to affirm the decision of the Third Circuit below.

ARGUMENT

I. PRESUMING THE ASSESSMENTS OF A BIASED TRIBUNAL TO BE CORRECT VIOLATES THE FIFTH AMENDMENT GUARANTEE OF PROCEDURAL DUE PROCESS.

The fifth amendment precept that no person shall be deprived of property without due process of law includes the guarantee of an "impartial and disinterested tribunal," in furtherance of the "powerful . . . constitutional interest in fair adjudicative procedure."[5] The assessment scheme of the Multiemployer Pension Plan Amendments Act ("MPPAA") denies this right to employers who withdraw from multiemployer plans. Empowering trustees, inherently biased decision makers, with great latitude in computing withdrawal liability, and then imposing the burden on employers to prove the assessment unreasonable, deprives employers of any meaningful opportunity to obtain a fair calculation of their liability. As described by Judge Bailey Aldrich, an employer withdrawing from a multiemployer pension plan:

> finds himself, without possibility of relief, in a boxing ring from which he had been told he might be

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[5] *Marshall* v. *Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980).

> exempt, the prize being his own money, in an uneven match, but assured by the referee that he would see to it that it was a fair fight.[6]

The Chamber recognizes that trustees are best equipped to make an initial determination of withdrawal liability, given their knowledge of the plan's history, its current provisions, and its likely future provisions. It may indeed have been "entirely reasonable"[7] for Congress to delegate this task to trustees, despite their inherent bias. However, presuming trustees' assessments to be correct and stripping the arbitrator of any substantive power to review their subjective determinations removes the only protection available to safeguard employers' due process rights. Only by striking down the presumption of correctness can this Court ensure that an impartial decision maker, the arbitrator, will afford employers the meaningful review of their withdrawal liability assessments that the fifth amendment requires.

A. Trustees Function as a Tribunal, Exercising Significant Discretion in Assessing Withdrawal Liability.

Contrary to the assertions of the Pension Benefit Guaranty Corporation ("PBGC") and the United Retail & Wholesale Employees Teamsters Union Local No. 115 Pension Plan ("Plan"),[8] trustees of multiemployer pension plans are decision makers who are intimately involved in the process of assessing withdrawal liability. Trustees make numerous adjudicative decisions, both in determining whether a variety of statutory exceptions apply to reduce the amount of liability, and in choosing the various actuarial assumptions and underlying data to be used in the calculations. References to trustees'

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[6] *Keith Fulton & Sons*, 762 F.2d at 1146 (Aldrich, J., dissenting).

[7] See PBGC brief at 30.

[8] PBGC brief at 34-41; Plan brief at 23-27.

limitations under "detailed and explicit statutory guides" [9] and "precis[e] . . . Congressionally-prescribed standards" [10] simply ignore trustees' broad latitude in the assessment process and the reality that trustees' decisions may increase or decrease liability by thousands of dollars, or eliminate it altogether. Far from performing a mechanical task of inserting predetermined numbers into a fixed formula, trustees are deeply involved in all aspects of the assessment process, and have vast power in determining the final liability figure.

1. *Trustees influence the choice of actuarial assumptions and the projection of underlying data.*

One way trustees influence withdrawal liability calculations is in the selection of actuarial assumptions. Technically, the assumptions and methods chosen represent the best judgment of plan actuaries, who are professional advisors to trustees in plan management and liability calculations. Indeed, the Act requires that the assumptions and methods used be "reasonable (taking into account the experience of the plan and reasonable expectations)," and, "in combination, offer the actuary's best estimate of anticipated experience under the plan." [11] However, an actuary's "best estimate of anticipated experience under the plan" clearly can be influenced by trustees' judgments in these areas. Indeed, the PBGC itself has recognized trustees' power in this area, stating: "[trustees] shall *approve* the actuarial assumptions upon which the plan's liabilities are calculated, including assumptions relating to mortality, interest, turnover, and administrative expenses." [12] Trustees' evaluation of a number of

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[9] PBGC brief at 34, *quoting Keith Fulton & Sons*, 762 F.2d at 1141, *quoting Textile Workers Pension Fund* v. *Standard Dye & Finishing Co.*, 725 F.2d 843, 855 (2d Cir. 1984).

[10] PBGC brief at 35, *quoting Dorn's Transportation, Inc.* v. *IAM Nat'l Pension Fund*, 578 F. Supp. at 1237-38.

[11] 29 U.S.C. § 1393(a)(1).

[12] 48 Fed. Reg. 31,252 (1983) (proposed rule) (emphasis added). In addition, the American Academy of Actuaries recommends that

subjective variables[13] thus is a critical factor in the assessment process, and has a pronounced effect on the amount ultimately assessed.[14] The statutory standards of "reasonableness" and "best estimate" leave trustees great latitude in the selection of assumptions and methods, and actuaries may utilize methods that comport with trustees' judgments without breaching their duties in any way.[15]

Moreover, when a fund's information on beneficiaries is incomplete, the gap must be filled by assumptions or projections. Data must be selected to use as the basis

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the actuary "take into account, to the extent he deems suitable, general or specific information available from other sources, including the plan sponsor, plan administrator, investment managers, accountants, economists, etc." American Academy of Actuaries, *1987 Yearbook*, Pension Plan Recommendations & Interpretations, Recommendation A, § 6.7 at 359. The Academy recognizes that "[a]s a result of these considerations, the actuary may develop actuarial assumptions that differ from plan to plan . . . ." *Id.*

[13] In addition to the variables noted by the PBGC, these assumptions may involve evaluation of the health of an industry, future levels of employment (including workforce needs, average hours to be worked, disability rates, salary projections), retirement age of employees, percentage of employees that will become vested, valuation of plan assets, future rate of return on plan assets, and funding assumptions (how much money must be contributed in the present year to meet the ongoing needs of the plan).

[14] *See, e.g., Transport Motor Express, Inc.* v. *Central States, Southeast & Southwest Areas Pension Fund*, 724 F.2d 575, 576-77 (7th Cir. 1983) ("Apparently the trustees of the Central States Fund considered three different actuarial estimates of unfunded vested benefits ranging from $2.047 billion to $4.108 billion before settling on the figure of $3.576 billion that provided the basis for the claims assessed against the withdrawing companies.").

[15] PBGC's undisputed assertion that "an enrolled actuary may have his enrollment suspended or terminated if he 'has failed to discharge his duties under [ERISA]'" (PBGC brief at 36 n.27, citing 29 U.S.C. § 1242(b)(1)) ignores the fact that an actuary's conclusion that assumptions favored by trustees are reasonable does not in any way constitute a failure by the actuary to discharge his duties.

for analysis, and statistical methods chosen to apply to them.[16] These assumptions can have a considerable effect on actuarial valuations. One GAO study concluded that the lack of complete participant data is "causing liabilities and costs of some plans to be under- or over-stated by millions of dollars." [17]

Thus, it is clear that trustees' decisions have a tremendous effect on the amount of withdrawal liability ultimately assessed, and their role is far from ministerial.

2. *Trustees rule on the applicability of statutory exceptions.*

The MPPAA's presumption of correctness applies to much more than withdrawal liability calculations. Section 104(2) provides that *any* determination trustees make under sections 1381 through 1399 and section 1405 are presumed correct.[18] As more fully detailed in the Appellees' brief,[19] these 20 sections of the Act charge trustees with making a variety of difficult and subjective determinations that have a profound effect on withdrawal liability. For example, trustees must determine whether and on what date an employer "permanently cease[d]" to have an obligation to contribute to the plan; whether

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[16] These data may include the number of covered employees and other beneficiaries, the number of vested employees, and the length of employees' credited service. While PBGC disputes that assessing withdrawal liability involves "case-specific, fact-bound adjudications" (PBGC brief at 28), it is difficult to imagine determinations more case-specific or fact-bound than these.

[17] *See* Comptroller General's Report to the Congress: *Incomplete Participant Data Affect Reliability of Values Placed by Actuaries on Multiemployer Pension Plans*, GAO/HRD-84-38 (1984) (cover). In one plan, when the previously missing birthdates for 12,000 participants were obtained, the actuarial liability increased by about 46 million dollars. *Id.* at iii.

[18] 29 U.S.C. § 1401(a)(3)(A).

[19] See Brief of Appellees at 21-22.

and when a company "permanently cease[d] all covered operations"; whether any of the specialized industry provisions apply; whether a "bona fide, arm's-length sale of assets to an unrelated party" occurred; and whether there was a "labor dispute." Each of these determinations contains subjective elements; for example: has the company's obligation to contribute *permanently* ceased? *When* did it cease?[20] Was the sale of assets *bona fide*? Was the sale conducted at *"arm's length?"*

PBGC contends that the applicability of many of these provisions is a matter of legal interpretation, as opposed to factual determination. It argues that since trustees' legal interpretations are not entitled to the presumption of correctness, their discretion in ruling on statutory exceptions already is tempered by *de novo* arbitral review.[21] This simply is not the case. First, as PBGC acknowledges,[22] only the preamble to a proposed rule[23] exempted legal determinations from the presumption of correctness; in its final rule, PBGC declined to "discuss the force and effect of the statutory presumptions."[24] Secondly, despite the possible distinction, many of trustees' determinations are factual, or contain both factual and legal elements. The arbitrator may not choose to divide trustees' rulings into legal conclusions and factual conclu-

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[20] *See, e.g., Transport Motor Express, Inc.* v. *Central States, Southeast & Southwest Areas Pension Fund*, 724 F.2d at 578-79 ("it is unclear whether the continued employment of a small number of employees engaged in closing a business would delay the 'cessation of covered activities' beyond the date when the bulk of an employer's operations are terminated"); *NLRB* v. *Cauthorne*, 691 F.2d 1023, 1026 (D.C. Cir. 1982) (the parties may have reached a bargaining impasse in 1979, cutting off the employer's obligation to contribute).

[21] *See* PBGC brief at 39-40.

[22] PBGC brief at 40 and n.33.

[23] 48 Fed. Reg. 31,253 (1983).

[24] 50 Fed. Reg. 34,681 (1985).

sions;[26] and even if the arbitrator does so, presuming trustees' "factual" rulings to be correct in this tremendously subjective area raises severe due process concerns.

In sum, the portrayal of withdrawal liability assessment as a non-adjudicative, "essentially legislative task"[26] in which trustees exercise an "extremely limited and circumscribed" degree of discretion[27] is unrealistic and inaccurate. Under the current statutory scheme, trustees are the decision makers, and reviewing arbitrators have extremely limited and circumscribed power. This Court should affirm the Third Circuit's decision striking down the presumption of correctness, so that employers will have an opportunity to obtain meaningful review of their withdrawal liability by truly impartial decision makers: arbitrators.

B. Trustees are Inherently Biased Against Withdrawing Employers.

"Impartial" is defined as "treating or affecting all equally."[28] Trustees, who owe a strict fiduciary duty to the fund and its beneficiaries, and no duty at all to withdrawing employers, cannot treat the interests and needs of both "equally." In fact, actuaries and plan officials participating in a 1985 GAO study cited as one of the reasons low interest rate assumptions were used for calculating withdrawal liability the fact that "*[t]rustees wanted to maximize the liability to withdrawing employers.*"[29] Congress specifically recognized this likelihood, stating:

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[26] *See* 29 C.F.R. § 2641.7(a)(1) (1986) (the arbitrator need not explicitly designate his findings of fact and conclusions of law as such).

[26] PBGC brief at 28.

[27] *Id.* at 34.

[28] *Webster's New Collegiate Dictionary* (1977) at 574.

[29] Comptroller General's Report to the Congress: *Effects of Liabilities Assessed Employers Withdrawing from Multiemployer Pension Plans*, GAO/HRD-85-16 (1985) at 26 (emphasis added).

> It is *expected* that plan trustees will need to make practical collection decisions which are consistent with their fiduciary duties and characteristic of any responsible creditor concerned with *maximizing the total ultimate recovery* at supportable costs.[30]

As the Third Circuit below observed, the possibility that trustees may not assess excessively high withdrawal liability for fear of discouraging future participation "does not mean the trustees are less biased, only that their manifest bias will not always result in gross injustice to employers." [31] The Chamber submits that the fact that there is a *possibility* that trustee bias will not result in injustice in a particular case does not rescue the MPPAA's scheme or make it "fair enough." [32]

II. THE EXISTING SCHEME IMPOSES AN ONEROUS BURDEN ON EMPLOYERS.

Employers may incur vast withdrawal liability debts, even if they make all required contributions before withdrawing. Horror stories abound of companies that withdraw from multiemployer plans or are forced into technical withdrawal by a labor dispute or union decertification election, then are assessed huge sums in withdrawal liability, sometimes more than the net worth of the company.[33] The enormity of this burden is compounded

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[30] 126 Cong. Rec. 23,288 (Aug. 26, 1980) (statement of Senators Williams and Javits) (emphasis added).

[31] 787 F.2d at 139.

[32] *See Keith Fulton & Sons*, 762 F.2d at 1140.

[33] *See Multiemployer Pension Plan Stabilization Act of 1981: Hearings before the Senate Subcommittee on Labor of the Committee on Labor and Human Resources*, 97th Cong., 2d Sess. 23 (1981) (statement of Hugh C. Shurtleff, president of Time-DC, Lubbock, Texas) ("Our liability is computed at about $30 million. Our net worth presently is between $16 and $17 million."); *id.* at 552-553 (testimony of Jay Stone, co-owner of Naman Rainwear Co., New York, New York) (withdrawal liability computed at $615,000, company's net worth $600,000); *id.* at 563 (testimony of

by the fact that § 104(2)'s presumption of correctness leaves little chance of successfully challenging the assessment.

Trustees' *prima facie* case is established as soon as they mail a claim to the employer. The company must begin to pay at once, and must meet an affirmative burden to prove that the claim is unreasonable. Thus, the contention that trustees are "merely litigants," whose withdrawal liability assessment "simply represents the plan's claim, much like a civil complaint,"[24] is far-fetched. A civil complainant bears the burden of proving entitlement to a money judgment before an impartial tribunal. Trustees bear no such burden. Nor are trustees "simply part of an administrative procedure . . . for reaching an initial determination of withdrawal liability . . . ."[25] Trustees' "initial determination" is the *final* determination unless the employer can prove it unreasonable. Thus, the characterization of employers' burden as "nothing more than . . . proving the initial withdrawal liability assessment incorrect or contrary to law"[26] proves too much; even phrased this way, this burden is too onerous to meet the fifth amendment's mandate.

Alan Lubell, president of Sandy Shaw, Inc., New York, New York) ("[O]ur withdrawal liability under MEPPA is approximately equal to our net worth [$1,300,000]").

A statement by Howard Ryder, president of Coastal Tank Lines, Akron, Ohio, is particularly telling: "We estimate that if total withdrawal liabilities are recognized, the entire unionized trucking industry will have a *negative net worth*." *Id.* at 15 (emphasis added).

[24] Brief of the Trustees of the United Mine Workers of America 1950 and 1974 Pension Plans as Amici Curiae ("Trustees") at 18.

[25] Trustees' brief at 16, *quoting Keith Fulton & Sons*, 762 F.2d at 1140.

[26] Trustees' brief at 19.

III. INVALIDATING THE PRESUMPTION OF CORRECTNESS WILL NOT OPEN THE FLOODGATES, AND EVEN IF IT WILL, THE COURT MUST STRIKE DOWN UNCONSTITUTIONAL PROVISIONS.

The role of arbitrators will not change drastically if the presumption is struck down. Arbitrators presiding over withdrawal liability challenges already perform an unusual function. The typical labor arbitrator interprets the terms of a contract, using a knowledge of the practices of the industry in general and the shop in particular, and considering the effect of a particular outcome on the future working relationship of the parties.

By contrast, an MPPAA arbitrator does not interpret the intentions of the parties as expressed in plan documents. Rather, he reviews an employer's challenge to a withdrawal liability assessment, and determines whether the employer has overcome the presumption of correctness and proved the assessment unreasonable. This determination requires a knowledge of federal pension law, pension funding theories, pension plan practices, and actuarial concepts. In sum, the role of the MPPAA arbitrator is "similar to that of a judge applying applicable law to the facts presented, and not a mediator attempting to reconcile competing interests." [37]

The MPPAA arbitrator's role would not change appreciably if the presumption were omitted. The arbitrator still would rule on whether the withdrawal liability assessment was reasonable in a given case; the burden simply would be on the trustees to prove reasonableness, rather than on the employer to prove unreasonableness.[38]

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[37] 126 Cong. Rec. 23,039 (Aug. 25, 1980) (Rep. Thompson).

[38] As one arbitrator recently stated in overturning a withdrawal liability assessment, "If de novo review is required/permitted, I would have arrived at the same valuation . . . ." *Casablanca Industries, Inc.* v. *UFCW Local 23-Giant Eagle Pension Fund*, 7 Empl. Ben. Cas. 2705, 2723 (1986) (Jaffe, Arb.).

This would not entail a "'futil[e]' . . . search for the 'correct' actuarial assumptions";[39] rather, an impartial review of the *reasonableness* of the assumptions and methods used.

Even if the fears of extended arbitration proceedings are justified, this Court should invalidate § 104(2) because it is unconstitutional. The fact that it may serve a "litigation-dampening" purpose[40] does not temper its invalidity.

CONCLUSION

Section 104(2) currently imposes an onerous and unconstitutional burden on employers withdrawing from multiemployer plans. This Court should affirm the decision of the Third Circuit below and invalidate this provision to remove the burden and encourage continued participation in multiemployer pension plans.

Respectfully submitted,

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March 9, 1987

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[39] PBGC brief at 43 (citations omitted).

[40] PBGC brief at 44.